## BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

VINCENT DELEON	)
Claimant VS.	)
BOONE BROTHERS ROOFING Respondent	) Docket No. 228,525 )
AND	
CNA INSURANCE COMPANIES Insurance Carrier	)

#### ORDER

Respondent appealed Administrative Law Judge Robert H. Foerschler's Preliminary Decision dated May 5, 1998.

#### ISSUES

The Administrative Law Judge denied respondent's request for an order compelling claimant to authorize further testing of a urine sample taken after his injury in order to confirm the chemical test as required by K.S.A. 1996 Supp. 44-501(d)(2)(E). The Administrative Law Judge found respondent had not established there was probable cause to believe that claimant was impaired at the time of the accident. Although the respondent's application for review contained four separate issues, the dispositive issue is whether the Administrative Law Judge erred in finding the respondent had not established probable cause to believe that claimant was impaired at the time of the accident.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant was injured on June 19, 1997, while working as a laborer for the respondent Boone Brothers Roofing Company. While claimant was being treated for his injuries, a urine sample was taken from claimant and analyzed by the University of Kansas Hospital laboratory. The urine sample tested positive for illegal drugs. However, in order for this chemical test to be admissible evidence in a workers compensation case, the test has to be confirmed by gas chromatography-mass spectroscopy or other comparable, reliable analytical methods. K.S.A. 1996 Supp. 44-501(d)(2)(E).

The first requirement for a chemical test to be admissible is the establishment of probable cause to believe the employee used, had possession of, or was impaired by the drug at the time of the work-related accident. See K.S.A.1996 Supp. 44-501(d)(2)(A). The Administrative Law Judge denied respondent's request for an order compelling claimant to authorize additional conformity testing because the respondent had not presented evidence

at the preliminary hearing to establish probable cause. Respondent, however, argues probable cause was established based on proof of claimant's prior drug use and the fact claimant was injured when he fell walking over slick primer placed on the roof.

The Administrative Law Judge's finding of no probable cause relates directly to the admissibility of the drug test into evidence. Before the Appeals Board can consider the question regarding the admissibility of evidence, it must first consider whether it has jurisdiction to review this preliminary hearing finding. The workers compensation act requires a definite foundation be laid before the results of a chemical test are admissible into evidence. See K.S.A. 1996 Supp. 44-501(d)(2). In this case, the Administrative Law Judge found the respondent had not established probable cause to believe that the claimant used, had possession of, or was impaired by the drug at the time of the work-related accident. Accordingly, he denied respondent's request for an order compelling claimant to authorize additional drug testing.

The Appeals Board has limited authority and jurisdiction when reviewing findings from preliminary hearings. The disputed issue must be one of those specifically set forth in K.S.A. 1997 Supp. 44-534a or the Administrative Law Judge must have exceeded his jurisdiction as required by K.S.A. 1997 Supp. 44-551. The jurisdictional issues listed in K.S.A. 1997 Supp. 44-534a are: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; or (4) whether certain defenses apply.

Because the issue now before the Appeals Board is not one listed in the preliminary hearing statute, the question becomes whether the Administrative Law Judge has exceeded his jurisdiction.

The Appeals Board finds the Administrative Law Judge has the authority at a preliminary hearing to determine whether the respondent has met all the foundation requirements for a chemical test to be admitted into evidence. Therefore, the Appeals Board concludes it does not have jurisdiction to review the Administrative Law Judge's preliminary hearing finding regarding whether a party has proven the foundation requirements for the admission of a chemical test.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that respondent's application for review should be, and is hereby, dismissed, and the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated May 5, 1998, remains in full force and effect.

IT IS SO ORDERED.	
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Dated this d	lay of J	uly 1	998.
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# BOARD MEMBER

c: Russell C. Purvis, Kansas City, MO D'Ambra M. Howard, Overland Park, KS Robert H. Foerschler, Administrative Law Judge Philip S. Harness, Director